Supreme Court, U.S.
FILED
NOV 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-572

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE BARBIZON CORPORATION,
Petitioner,
v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN and JOSEPH MOORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

K. PETER SCHMIDT *
PHILIP W. HORTON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

MARC E. RICHARDS
MYERSON & KUHN
237 Park Avenue
New York, New York 10017
(212) 599-6000

Attorneys for Respondents ILGWU National Retirement Fund, Sol C. Chaikin and Joseph Moore

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the district court and the court of appeals properly held that petitioner The Barbizon Corporation ("Barbizon") does not qualify for a reduction in its withdrawal liability to respondent ILGWU National Retirement Fund (the "Fund") * under section 4217(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1397(a)(2), as a result of the closure of Barbizon's factory in Provo, Utah?

2. Whether the district court and the court of appeals properly held that Barbizon does not qualify for a reduction in its withdrawal liability to the Fund under ERISA section 4217(a)(1), 29 U.S.C. § 1397(a)(1), as a result of the closure of Barbizon's Provo factory?

---

* Respondents Chaikin and Moore were trustees of the Fund when this action was filed.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. BARBIZON CANNOT IDENTIFY ANY ISSUES WHICH MERIT REVIEW BY THIS COURT	2
II. THE COURTS BELOW PROPERLY HELD THAT THE CLOSING OF BARBIZON'S PROVO PLANT WAS NOT A FACILITY CLOSING WITHIN THE MEANING OF ERISA § 4217(a)(2)	5
III. THE COURTS BELOW PROPERLY HELD THAT BARBIZON WAS NOT ENTITLED TO RELIEF UNDER ERISA § 4217(a)(1)	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: Page

Central Pennsylvania Teamsters Pension Fund v. *Royal Swan Foods*, No. 84-4163, slip op. (September 19, 1985) 8

Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) 2

May Stern & Co. and Western Pennsylvania Teamsters and Employers Pension Fund, 8 Employee Benefits Cas. (BNA) 2205 (April 16, 1987) (Nagle, Arb.) 7-8

Nachman Corp. v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) 7

Paperworkers Local 286 Pension Plan and Karden Industries, 6 Employee Benefits Cas. (BNA) 2398 (April 8, 1985) (Nagle, Arb.) 7

Pension Benefit Guaranty Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 2, 5, n.3

Pension Benefit Guaranty Corp. v. *Yahn & McDonnell, Inc.*, —— U.S. ——, 107 S. Ct. 2171 (1987) 2

PBGC Opinion Letters:

Opinion Letter No. 82-33 (October 28, 1982) 6-7

Opinion Letter No. 85-1 (January 4, 1985) 6-7

Opinion Letter No. 82-22 (August 3, 1982) 6-7

Legislation:

ERISA Section 4217(a)(1), 29 U.S.C. § 1397(a)(1) ..... *passim*

ERISA Section 4217(a)(2), 29 U.S.C. § 1397(a)(2) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-572

THE BARBIZON CORPORATION,
Petitioner,

v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN and JOSEPH MOORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Respondents object to Barbizon's statement of the case and refer this Court to the "Background" statements in the opinions of the court of appeals and the district court, which appear at pages A2-A6 and A15-A17 of the Appendix.

Respondents particularly object to the assertion in Barbizon's statement of the case that when Barbizon closed its Provo plant it transferred its work to nonunion contractors. The record actually establishes that Barbizon shifted the bulk of the Provo work to union contrac-

tors, where *it continued* to have an obligation to make (and did in fact make) contributions with respect to such work. Barbizon's distorted factual assertions, which are unsupported by the record, together with its significant factual omissions (principally the fact of its ongoing contribution obligation regarding the work in question) underlie Barbizon's specious claim that the decision of Judge Weinfield and the unanimous decision of the Second Circuit panel will somehow prevent multiemployer plans from collecting withdrawal liability when employers shift from union to nonunion labor.

REASONS FOR DENYING THE WRIT

I. BARBIZON CANNOT IDENTIFY ANY ISSUES THAT MERIT REVIEW BY THIS COURT.

Perhaps the most striking aspect of the petition is Barbizon's failure to identify any issues of sufficient import to justify the involvement of this Court. All prior MPPAA cases reviewed by the Court have involved fundamental issues of broad scope, *e.g.*, the Constitutionality of withdrawal liability generally, of its retroactive application, or of the statutory presumption of correctness afforded plan determinations. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *Pension Benefit Guaranty Corp.* v. *Yahn & McDonnell, Inc.*, —— U.S. ——, 107 S. Ct. 2171 (1987). Each of these cases presented broad challenges to the statutory scheme for withdrawal liability, and had fundamental implications for thousands of employers.

This case, by contrast, is virtually *sui generis*. ERISA section 4217(a)(2), 29 U.S.C. § 1397(a)(2), applies only to employers who closed a facility prior to September 26, 1980 (the effective date of MPPAA), but did not withdraw until after that date. The decisions below can af-

fect only a minuscule fraction of this already-small group.

Under those decisions, Barbizon's pre-MPPAA shift of contributory work from unionized, common-law employees to outside union contractors, contractors for whose employees Barbizon continued to have a contribution obligation and to make contributions, does not entitle Barbizon to a reduction in any withdrawal liability it subsequently incurs. Only similarly-situated employers who closed a factory over eight years ago and shifted their work in this manner could be affected.

While Barbizon understandably would prefer not to pay its withdrawal liability, that fact does not expand the scope of this case beyond a very narrow issue affecting, at most, a handful of employers. Nor is there any conflict with any other decision, at either the circuit or district court level. Under these circumstances (and quite apart from the fact that the courts below reached the only appropriate decision), there simply is no reason to involve this Court.

Unable to contend plausibly that the section 4217 issues are sufficiently important to merit review, Barbizon suggests that Judge Weinfeld and the Second Circuit have so badly misunderstood the principles underlying MPPAA that their decisions "will have disastrous results in future cases" not involving that section. (Pet. at 8.) The basis for this apocalyptic claim is that Barbizon allegedly shifted its Provo work to *nonunion* contractors for whom it did not contribute to the Fund.

As Barbizon correctly states, a post-MPPAA shift to nonunion labor may result in either a complete or a partial withdrawal. Similarly, a total, pre-MPPAA shift to nonunion labor as a result of closing the Provo plant would have qualified as a facility closing under Section 4217. Barbizon argues incorrectly that the Fund and

the decisions below fail to recognize the latter proposition, and that this failure will also preclude recognition of the former. (Pet. at 24-27.)

Respondents agree that a pre-MPPAA shift to nonunion labor as a result of a plant closing may entitle an employer to relief under section 4217, just as a post-MPPAA shift to nonunion labor may result in either a complete or a partial withdrawal. Indeed, a shift to nonunion operations is perhaps the clearest case for assessing withdrawal liability. The problem for Barbizon is that when it closed its Provo plant it did not shift to nonunion labor. It shifted to *union* contractors, and retained its contribution obligation on such work.[1] Although the petition tirelessly repeats a contrary claim, the record is bereft of any evidence of a shift to nonunion labor until long after the closing of the Provo plant and the effective date of the statute—a fact of which the Second Circuit was well aware.[2]

Ultimately, Barbizon did change over to a noncontributory (nonunion) production basis, and that changeover triggered Barbizon's withdrawal from the Fund in 1982. As of the effective date of the statute, however,

---

[1] Collective bargaining agreements in the ladies garment industry generally require that manufacturers like Barbizon, rather than the contractors they use, make contributions on the work of contractor employees. Thus, after closing Provo, Barbizon continued to contribute on the production of its newly-retained outside contractors.

[2] Barbizon cites pages A285, A288 and A214-18 of its Appendix for the proposition that it shifted its work to nonunion contractors and to its nonunion plant in Puerto Rico. (Pet. at 5-6.) These portions of the record, however, do not show retention of any nonunion contractors before February of 1981—several months after both the closing of the Provo plant and the effective date of MPPAA. Moreover, it is undisputed that Barbizon did not open its Puerto Rico plant until March 1982, nearly two years after it closed its Provo operation. (*See* Barbizon's Response to Defendants' Interrogatory No. 5; A263.)

Barbizon continued to have an obligation and continued to contribute on work previously done at the Provo plant. Thus, the only issue decided in this case was whether the 1980 shift from one form of contributory operation to another qualified Barbizon for relief under section 4217. Barbizon's claim that the decisions below will somehow disrupt the entire statutory scheme is totally without foundation.[3]

II. THE COURTS BELOW PROPERLY HELD THAT THE CLOSING OF BARBIZON'S PROVO PLANT WAS NOT A FACILITY CLOSING WITHIN THE MEANING OF ERISA § 4217(a)(2).

Although Barbizon's failure to identify any issues of significance to other cases is in itself a sufficient reason for denying the petition, denial is also proper since Judge Weinfeld's and the Second Circuit's holdings were entirely correct.

As the court of appeals noted, the 1980 change in its operations did not cause Barbizon to discontinue any product lines, alter any trademarks, modify its marketing procedures, lose any productive capacity, suffer any loss of sales, or incur any material change in the level of its contribution obligation. (A4.) In other words, the closure of the Provo plant reflected neither an end to the business previously associated therewith, nor a cessa-

---

[3] Indeed, the Fund administers the statute in exactly the same manner in all situations, both pre- and post-MPPAA. The Fund does not treat as a withdrawal a shift from contributory, in-house production to contributory operations using outside contractors in *either* time setting. This fact is perhaps best illustrated by the Barbizon case itself. At the time Barbizon closed the Provo plant, June of 1980, the effective date for withdrawal liability was April 29, 1980, and yet the Fund never contended that the closing produced a withdrawal. (Congress subsequently amended ERISA to make the effective date for withdrawal liability coterminous with MPPAA's date of enactment, *see R.A. Gray, supra*, which made the Provo plant closing a pre-MPPAA event.)

tion of its obligation to contribute thereon. Instead, it reflected only Barbizon's decision to shift its mode of production to outside contractors.

Since Barbizon cannot dispute the fact that it merely shuffled its contributory operations in 1980, it urges the Court to adopt a simplistic approach under which the facility closing relief granted under section 4217 would turn only on the physical shut-down of a discrete physical location. Under Barbizon's approach, an employer who, prior to MPPAA, closed a plant but shifted its operations lock, stock and barrel into a new building across the street, would, in a subsequent, post-MPPAA withdrawal, avoid all liability based on operations at its old building.

Nothing in MPPAA, its legislative history, the cases decided under section 4217, or the statements of the Pension Benefit Guaranty Corporation ("PBGC") supports such a simplistic approach. The term "facility" is not defined in section 4217 or elsewhere in the statute. The only relevant legislative history—which states that a facility is "an economic unit, *generally* at a single physical location"—demonstrates, however, that Barbizon's narrow definition of the term will not always be appropriate. (*See* Decision of the court of appeals at A9.) Interpreting the legislative history, Judge Weinfeld noted the following:

> Although a facility will often consist of a single physical plant, Congress clearly contemplated exceptions. One such exception would be where a plant merely moved across the street without ceasing business in any way. Another exception would be where an employer closes one plant and opens another because it has adopted a new method of production in order to escape responsibilities to employees. (A21-22.)

A number of opinion letters issued by the PBGC contain similar statements, demonstrating that a mere shift

of production does not constitute the closing of a facility. *See* Opinion Letter Nos. 82-33 (October 28, 1982) (Appendix GG at A310-13), 85-1 (January 4, 1985) and 82-22 (August 3, 1982) (Appendix II at A317-18). As the PBGC stated in Letter No. 82-33:

> It is our opinion that the term "facility" in Section 4217 of ERISA, in the context of the retail food industry, ordinarily means a single store. Thus, a single retail food store which is permanently closed ordinarily would be "a facility at which all covered operations permanently ceased," within the meaning of Section 4217(a)(2) of ERISA, regardless of whether all of the retail food stores operated by a national chain in a given city were closed. *However, there may be circumstances in which the plan sponsor may determine that a shift of operations from one location to another constitutes a continuation of operations at a facility.* (A311-12.) (Emphasis supplied.)

As this Court has recognized, the PBGC's position on the meaning of the statute is entitled to deference. *See Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 373-74 (1980). Both of the decisions below properly relied on these opinion letters in rejecting Barbizon's mechanistic view of section 4217. (A10-11; A22.)

Moreover, as those decisions recited, both judicial and arbitral decisions have recognized that a shift in operations may preclude a facility closing. *See Paperworkers Local 286 Pension Plan and Karden Industries*, 6 Employee Benefits Cas. (BNA) 2398, 2408 (April 8, 1985) (Nagle, Arb.)[4] (rejecting a claim of a facility closing where "the productive operations which had been performed at [the closed plant] . . . did not themselves cease" but were transferred to another location); *May*

---

[4] Arbitrator Nagle is the former Executive Director of the PBGC.

Stern & Co. and Western Pennsylvania Teamsters and Employers Pension Fund, 8 Employee Benefits Cas. (BNA) 2205, 2215 (April 16, 1987) (Nagle, Arb.) (company qualified under § 4217 because "[t]here is no suggestion that the covered work performed at a closed facility was simply transferred to another facility"); *Central Pennsylvania Teamsters Pension Fund* v. *Royal Swan Foods*, No. 84-4163, slip op. at 8 (A307) (court held that relief under § 4217 was proper "barring some evidence that the employer shifted operations from one store to another").[5]

These decisions, together with the statements of the PBGC and the legislative history, demonstrate that the decisions below are correct.[6] In view of this wealth of authority, the absence of any authority to the contrary,[7] and the lack of any issues of wide significance, review by this Court is neither necessary nor appropriate.

In a transparent and spurious attempt to increase the emotional content of its petition, Barbizon contends that the courts below erred in failing to grant relief under section 4217 because "there was at least an 80% decline in contributions because of the Provo closure." (Pet. at

---

[5] These cases are discussed in the decision of the court of appeals at A9-11 and in the decision of Judge Weinfeld at A22-24.

[6] In addition to the cases discussed above, Judge Weinfeld correctly noted that "[t]he garment industry has a unique history of shifting from direct production to indirect jobber status in order to avoid obligations to employees" and that, in light of this history, it was particularly appropriate to find that Barbizon's shift to the use of contractors "was no more than a continuation of the same business Barbizon had conducted in Provo." (A22, A23.)

[7] Most of the cases cited by Barbizon involved claims by a plan that all of an employer's establishments taken together constituted a single facility so that the closure of a single establishment prior to MPPAA did not constitute a facility closing—a claim which respondents are not making. None of those cases is relevant to an employer that shifted its operations.

18-19.) This manipulation of the stipulated facts is nothing more than sleight of hand, and a fairly clumsy effort at that.[8] Even if there were any merit to Barbizon's calculations, writs of certiorari are not customarily granted to resolve a dispute over a simple, arithmetic calculation.

Barbizon also now argues, for the very first time, that summary judgment was improper due to an allegedly disputed issue of fact regarding the decline in its contributions.[9] (Pet. at 22-24.) This claim is baseless. No material facts are in dispute; the figures regarding Barbizon's contributions all appear at A294-95. The only dispute is whether Barbizon made a mathematical error in

---

[8] The relevant figures regarding Barbizon's contributions to the Fund appear at A294-95. Barbizon reached its 80% figure, asserted for the first (and, prior to now, only) time in its reply brief in the court of appeals, by comparing the increase in contributions made on behalf of union contractors between 1979 and 1980 with the drop in contributions for Provo between 1979 and *1981*—simply ignoring $36,000 in contributions made for Provo in 1980. (*See* Pet. at 19 n.3.) When these contributions are included, the decline is approximately 41%. This decline would not result in a partial withdrawal under ERISA section 4205, and thus should not result in a finding that there had been a facility closing. This is especially true since a 41% decline represents nowhere near the reduction that would be expected from simply closing the Provo plant (which had represented 90% of Barbizon's operations).

[9] Judge Weinfeld specifically asked counsel for Barbizon below whether there were any disputed issues of fact:

> THE COURT: I take it both sides agree that the matter is ripe for summary judgment. There are no factual issues.
>
> MR. SCHMIDT: That's our position, Your Honor. I believe that's the position of the plaintiff.
>
> THE COURT: That is the plaintiff's position?
>
> MR. WIMBERLY: Yes, your Honor.

Having agreed below that summary judgment was appropriate, Barbizon should not, having become unhappy with the judgment it sought, be heard to argue the contrary here.

trying to put the best face on those figures. The court of appeals was perfectly capable of resolving that dispute by reviewing the undisputed facts, and there is certainly no reason for this Court to become entangled in those calculations.

III. THE COURTS BELOW PROPERLY HELD THAT BARBIZON WAS NOT ENTITLED TO RELIEF UNDER ERISA § 4217(a)(1).

Barbizon also seeks review of the determination of Judge Weinfeld, affirmed unanimously by the court of appeals, that Barbizon is not entitled to a reduction in its withdrawal liability under ERISA section 4217(a)(1), 29 U.S.C. § 1397(a)(1). Under that section, withdrawal liability calculations are made by disregarding contributions with respect to "work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute" prior to MPPAA. Barbizon contends that contributions for work done at the Provo plant should be disregarded under this section because it had entered into a supplemental agreement with the International Ladies' Garment Workers' Union governing the closure of that plant. That supplement recognized that Barbizon's obligation to contribute for work done in Provo would expire when the plant closed and no more work was being performed there. (Pet. at 27-30.)

With respect to this claim, Barbizon does not even contend that the issues are sufficiently important to merit review by this Court; it has, as with its other positions, simply inserted as much of its prior argument as possible without exceeding the page limit for its petition. There is no reason for the Court to concern itself with this technical, fact-specific issue, which was fully considered by the courts below.

In any event, the reason that Barbizon is not entitled to relief under this section is easily stated.[10] As the courts below held, section 4217(a)(1) requires a complete cessation of an employer's duty to contribute under a particular collective bargaining agreement. At any given time, Barbizon's duty to contribute was created by a single Master Agreement which covered not only the Provo plant but also all of Barbizon's other operations, including the contractors it hired. Thus, although Barbizon's duty to contribute *at Provo* ended when that plant was closed, its overall duty to contribute never ceased, because it had a single, seamless obligation to contribute under the Master Agreement. In the absence of a permanent cessation of an obligation of Barbizon to contribute, there is no basis for relief under section 4217(a)(1).

[10] A more detailed discussion is contained in the opinions of the court of appeals and the district court at pages A7-8 and A24-25, respectively.

CONCLUSION

For the reasons stated above, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

K. PETER SCHMIDT *
PHILIP W. HORTON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

MARC E. RICHARDS
MYERSON & KUHN
237 Park Avenue
New York, New York 10017
(212) 599-6000

Attorneys for Respondents ILGWU National Retirement Fund, Sol C. Chaikin and Joseph Moore

* Counsel of Record

DATED: November 2, 1988